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No. 159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., *Appellants,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

PRELIMINARY STATEMENT

This brief is submitted on behalf of the Midwestern railroad appellants[1] in opposition to four motions to affirm, the principal one of which is that filed on behalf of The Atchison, Topeka and Santa Fe Railway Company, et al.[2]

[1] One of the original appellants, Chicago Rock Island and Pacific Railroad Company, entered into a merger agreement with Union Pacific Railroad Company (referred to without identification in note 2 on page 5 of the Atchison motion), and its counsel have filed a motion asking that the appeal be dismissed as to it.

[2] This motion is referred to herein as the Atchison motion. The other three motions were filed by appellees Southern Pacific Company, et al., People of the State of California, et al., and Arizona Corporation Commission, et al. The motion of Southern Pacific Company, et al. adopts the arguments in the Atchison motion, and the other two motions present some of the same arguments.

After explaining that a portion of the case before the Commission has been settled, appellees[3] attempt to minimize the significance of this appeal by stating that the controversy remaining before this Court is "a mere fragment" of the original case. In fact, almost all questions raised by the three appeals (Nos. 143, 159 and 576) are still before this Court, and their importance is not diminished in the slightest. The settlement between appellees and the Eastern lines has had little effect on the scope of the issues and no effect on their importance.[4] The settlement agreement between appellees and certain Midwestern lines—which are either subsidiaries or allies of appellees or roads which were neutral in the proceedings before the Commission—has not in any way limited the issues. The reduction in the number of parties does not diminish the importance of the questions. The resolution of these issues involves the proper administration of Section 15(6) of the Interstate Commerce Act (49 U.S.C. 15(6)) and the division of approximately $500 million in freight revenues per year as between 53 independent Midwestern railroads and 60 Mountain-Pacific railroads (appellees).

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[3] Unless qualified, references herein to appellees relate to the carrier appellees (i.e., those which filed the Atchison motion and Southern Pacific Company, et al., which concurred therein); and references to B&O J.S. are to the jurisdictional statement in No. 143.

[4] This is also true of the recent settlement made with the Eastern lines by Chicago, Milwaukee, St. Paul and Pacific Railroad Company, one of the appellants on whose behalf this brief is submitted. The Chicago, Milwaukee, St. Paul and Pacific is predominantly a Midwestern line which also operates in Mountain-Pacific Territory; and the settlement applies between it as a Mountain-Pacific carrier and the Eastern lines, and does not affect its interests as a Midwestern line.

It is hardly feasible in a compact brief opposing the motions to affirm to place in proper perspective all of the contentions raised in the 65 pages of those motions. The very length of the arguments in the motions tends to highlight the importance of the issues presented by this appeal and the necessity for plenary consideration by this Court.

I.

THE LOWER COURT'S HOLDING WITH RESPECT TO FINDINGS FOR INDIVIDUAL CARRIERS (ATCHISON MOTION POINT II, PAGES 24-31)

Recognizing that the lower court's holding that the Commission must make findings as to each of the 300 individual carriers gives emphasis to the enormity of the lower court's erroneous treatment of the revenue needs issue, appellees now try to dissociate themselves from its effect. They assert that appellants "resort to the scare technique" of charging that the lower court's decision would require "separate findings with respect to each and every one of the 300 individual carriers." It was appellees, however, who argued to the lower court that findings must be made for each and every carrier.[5] The lower court accepted the

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[5] For examples: In their opening brief, appellees argued (p. 28) that "The Commission has failed to find and determine the financial effect of its orders upon the *individual carriers* . . . in violation of Section 15(6) . . .," and (p. 29) that "The Commission's disregard for the consequences of its orders upon *individual carriers* was particularly flagrant with respect to the Denver & Rio Grande Western Railroad"; in their reply brief they contended (p. 35) the Commission erred in failing "to determine the effect of its orders upon the Rio Grande *or any other carrier*"; and in their requested conclusion of law numbered 9 they asked the lower court to hold that the Commission had failed to make findings as to "the amount of revenue required by

contention as it was actually presented and based its decision on that acceptance. In retreating, appellees impliedly concede that it would be wholly impossible for the Commission in an interterritorial divisions case to administer Section 15(6) of the Interstate Commerce Act (49 U.S.C. 15(6)) by making findings as to all statutory criteria for each individual carrier involved.

The new proposition which appellees attempt to sustain—that findings must be made for three carriers—is equally invalid. When, as here, the contending carriers associated themselves in groups and presented their case as part of a group, the statute permitted the Commission to deal with them on a group basis so long as there was typical evidence. This was the precise holding of *New England Divisions Case,* 261 U.S. 184, 196-199 (1923). The opinions in *Official-Southern Divisions,* 325 I.C.C. 1, 7, 10, 38-45; 325 I.C.C. 449, 450-453 (1965), in no wise support appellees here. In that case all of the carriers in the North comprised one group, and all of the carriers in the South except one, the Norfolk Southern Railway Company, comprised another group. Both the southern carrier group and the Norfolk Southern presented evidence which treated the Norfolk Southern as atypical. On the basis of such evidence the Commission prescribed a special basis of *primary* divisions on interterritorial traffic transported by the Norfolk South-

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individual carriers, the financial effect of the new divisions upon *individual carriers,* and the extent to which the new divisions provide the amount of revenue required by *individual carriers. . . .*" (Emphasis supplied) The lower court so understood appellees' contentions (B&O J.S. 5a, 9a), and held squarely for appellees on this point. (B&O J.S. 20a)

ern between Norfolk (the gateway point) and points on its own line.[6]

In the instant case, on the other hand, the three carriers referred to by appellees did not assert that they were atypical or ask for separate treatment. The Katy and the Frisco associated themselves with the Midwestern group, and the Denver and Rio Grande Western associated itself with the Mountain-Pacific group. They joined with their respective groups in presenting typical evidence demonstrating the characteristics of the traffic, revenues, economic conditions, costs, etc. in the areas served by the groups, and they presented no evidence differentiating their individual situations from that of the group with which they had elected to associate. The Katy and the Frisco asked for and were accorded by the Commission the same treatment as other carriers operating in the Midwest, and the Rio Grande asked for and was accorded by the Commission the same

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[6] In other situations involved in *Official-Southern Divisions, supra,* in which exclusions were sought from the prescribed general basis for particular segments of traffic, relief was denied in every case in which differentiating evidence was not submitted at the hearings. (325 I.C.C. at 35)

The prescription of the special basis for the Norfolk Southern in that case was only as to *primary* divisions accruing solely to that line. In instances in which the Norfolk Southern received a *subdivision* out of a primary division covering a haul performed by it jointly with another carrier in the South, the Commission fixed for the joint services the general basis prescribed for southern carriers as a group, and not the special basis for the *primary* division of the Norfolk Southern. (325 I.C.C. at 40 and 45)

treatment as other Mountain Pacific carriers.[7] The Commission in its supplemental report considered petitions for reconsideration filed on behalf of these three carriers after the entry of its initial order, and found them without merit. (B&O J.S. 147a, 156a-158a)

II.

THE LOWER COURT'S HOLDING THAT REVENUE NEEDS MUST BE FOUND "IN TERMS OF DOLLARS" (ATCHISON MOTION POINT I-A, PAGES 7-14)

Contrary to the argument of appellees, the "revenue needs" issue before this Court involves the substantive question of the meaning of Section 15(6) of the Interstate Commerce Act (49 U.S.C. 15(6))—not the requirements of Section 8(b) of the Administrative Procedure Act. (5 U.S.C. 1007(b)) The question is: what does Section 15(6) mean when it provides that "due consideration" is to be given to "the amount of revenue required [by the carriers concerned] to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation?"

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[7] The shares of the revenue from joint rates on Transcontinental traffic which the Rio Grande (which operates from Denver and Pueblo, Colo., to Ogden and Salt Lake City, Utah) would receive under the Commission's orders are represented by subdivisions of the prescribed *primary* divisions west of Denver and Pueblo, which the Rio Grande divides with other Mountain-Pacific lines operating between Ogden and Salt Lake City, Utah, and points in Transcontinental Territory. Before the Commission, appellees, including the Rio Grande, argued that subdivisions of the Rio Grande were not in issue, and the Commission made no prescription of such subdivisions. (B&O J.S. 147a)

The Commission's interpretation of this revenue needs clause is made clear in the findings which it actually made under that clause. It first found that the Mountain-Pacific lines (appellees) received a substantially higher ratio of revenues to costs than the Midwestern lines from the involved traffic. (B&O J.S. 63a-68a) It then found that the Mountain-Pacific carriers were in a more favorable financial condition than the Midwestern carriers when tested by annual rates of return on investment in all carrier properties provided by net railway operating income from *all* services. (B&O J.S. 76a, 77a, 82a, 88a) In addition thereto, it considered the traffic growth and earning power, present and prospective, of the Mountain-Pacific and Midwestern carriers. (B&O J.S. 88a-90a) The special claim of the Moutain-Pacific carriers for an increase in divisions to provide investment funds for anticipated enlargement of facilities to serve the public was expressly rejected by the Commission on the ground that the evidence, which was voluminous and in part conflicting, showed that the positions of the territorial groups of railroads did not differ as to this matter.[8] (B&O J.S. 94a-96a, 134a) After prescribing scales

[8] The California motion makes (p. 6) the specious argument that this holding of the Commission was contrary to "uncontroverted evidence," and (p. 7) that the lower court's construction of the statute, requiring a finding of revenue needs in dollars, reached this special claim as a ground for invalidating the Commission's order. The lower court did not address any discussion or specific holding to this special claim, which involved the evaluation of evidence—a matter as to which the court held administrative findings were not required. (B&O J.S. 10a, 19a, 20a) As this Court has observed, "problems of transportation economics are complicated and involved," and the significance of revenue needs and other facts which enter into the pricing of railroad services is for the Commission. *New York* v. *United States,* 331 U.S. 284, 335, 349 (1947); *cf. Interstate Commerce Commission* v. *New York, N.H. & H.R. Co.,* 372 U.S. 744, 760-761 (1963).

of divisional factors for Midwestern and Mountain-Pacific Territories designed to reduce the disparity in the ratio of revenues to costs from the involved traffic, the Commission evaluated the results of the application of the scales, finding that they would produce "moderate increases" for the Midwestern lines.[9] (B&O J.S. 104a, 153a)

Appellees contended in the court below that the revenue needs clause in Section 15(6) means that something more than these findings was required, and the court responded by holding that findings "in terms of dollars" were required. (B&O J.S. 11a, 19a-20a) In so holding the lower court ignored what the Commission pointed out in its supplemental report: namely, that the absence from the Commission's report of findings "In terms of dollar amount" was in conformity with its prior administrative practice and in keeping with the decisions of this Court. (B&O J.S. 132a-136a) The lower court's construction of the revenue needs clause is not supported by the words found therein, and serves no regulatory purpose. It is significant that the financial community relies on the same kinds of financial data—rates of return and relationships of revenues to operating expenses—as the Commission here used.

The lower court erred in treating the "revenue needs" provision as requiring specific findings "in terms of dollars" for another reason: namely, the Commission did not, as appellees allege, prescribe increased divisions for the Midwestern lines in order to satisfy their greater general

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[9] The Commission prescribed a divisional scale with 10 percent higher factors for Mountain-Pacific Territory, and thereby gave the lines in that territory greater revenue for a mile of service than it gave the Midwestern lines. This inflation was allowed in recognition of the higher level of class rates prescribed for Mountain-Pacific Territory. (B&O J.S. 104a)

revenue needs. The Commission's statements as to the basis for the prescribed increases in Midwestern divisions read: "consideration of the evidence bearing on cost of service previously discussed convinces us that the primary midwestern divisions as a whole are too low" (B&O J.S. 97a); and the "moderate increases" prescribed in Midwestern divisions "were supported by the evidence concerning cost of service" (B&O J.S. 153a), which evidence had been the subject of extensive findings. (B&O J.S. 42a-71a, 78a, 103a, 124a-132a, 143a)

In view of the clear logic of the Commission's report, appellees' invective in describing the Commission's decisional process as "a game of blindman's buff" and as "administrative double-talk" is not well taken. Nor does *Official-Southern Divisions,* 325 I.C.C. 1 (1965), reflect a "repudiation" of the orders in the instant case. The report in the *Official-Southern* case does not, as appellees claim, contain at pages 49-50 "findings which state, in dollars, the amounts of revenues required by the carriers, and which state, in dollars, the financial effect of the new divisions which were prescribed." There were no findings of revenue needs "in dollars"; and the findings referred to represent nothing more than the arithmetical result of applying the percentage distribution of the costs found by the Commission to the total revenue involved, as the Commission explained in its supplemental report in *Official-Southern Divisions,* 325 I.C.C. 449, 453-454 (1965).

III.

THE STRUCTURE OR PATTERN OF THE DIVISIONAL SCALES PRESCRIBED BY THE COMMISSION (ATCHISON MOTION POINT I-B, PAGES 14-20)

Appellees attempt to support the judgment of the lower court on a ground which was urged by them and rejected

below. They challenged the wisdom of the scales of divisional factors prescribed by the Commission (with a 15 percent minimum when origin or destination service is performed) for service in Midwestern and Mountain-Pacific Territories, contending that the Commission had erroneously failed to construct the scales solely on the basis of cost data. The lower court held that this argument would call upon it to usurp the functions of the Commission.[10]

Furthermore, appellees contend that the divisional scales prescribed in *Official-Southern Divisions*, 325 I.C.C. 1 (1965), were structured on cost data, implying, if not urging, that this Court should direct the Commission to construct divisional scales on a cost basis. The prescription of divisional scales related to cost scales in that case was not a repudiation of the Commission's reports in the present case. The decision in *Official-Southern Divisions* simply reflects the contentions of different parties on a different record with different issues. Indeed, in *Official-Southern Divisions* each of the two contending groups asked the Commission to prescribe divisions on a cost basis. But even if the Commission had "repudiated" its action here, that

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[10] The lower court said: "Plaintiffs' contentions re unlawfulness of the findings, and failure to make findings in many instances, concern matters as to which the Commission has used what this court believes to be the particular *method* adopted by the Commission in its discretion, as a body of experts, in the determination of factors or elements of factors it is required by the statute to consider. Specific findings of the propriety of the use of information which the Commission, as experts in this field, considers to be sufficient and adequate re pertinent elements are not necessary. To require same would be to compel the Commission to justify each method and all facts considered in arriving at every factor involved in the making of new divisions." (B&O J.S. 18a-19a)

would be no ground for reversal, since it is well settled that an inconsistency of the report of an administrative agency under review with the report in another case is not a ground for setting aside the order under review. *Manufacturers Ry. Co.* v. *United States,* 246 U.S. 457, 482 (1918); *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, 665-666 (1926); *Georgia Public Service Commission* v. *United States,* 283 U.S. 765, 775 (1931).

The Commission devoted several pages of its reports to a discussion of the reasons for its prescription of the divisional scales which it found just, reasonable and equitable. (B&O J.S. 103a-104a, 142a, 143a, 145a-146a) It made a finding that divisional scales for Midwestern and Mountain-Pacific Territories should give recognition to the pattern of rate scales, saying that "it is reasonable to divide the rates to some extent in accordance with the way they are made." (B&O J.S. 146a) Thus, the Commission made an explicit finding supporting the basis for its prescription of divisional scales predicated on the rate-scale principle that the starting point should be higher than that found in scales based solely on costs. That basis is rational on its face; and, as the Commission pointed out, is the method often employed "as a suitable foundation for constructing divisional scales. . . ."[11] (B&O J.S. 145a-146a, and note 2).

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[11] Orders of the Commission prescribing divisional scales patterned upon the rate-scale principle were upheld in *Beaumont, Sour Lake & Western Ry. Co.* v. *United States,* 282 U.S. 74 (1930); *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349 (1936); and *Boston & Maine R.R.* v. *United States,* 208 F.Supp. 661 (D. Mass. 1962); affirmed 371 U.S. 26 (1962).

IV.

THE ALLEGED UNCHALLENGED INDEPENDENT GROUND FOR AFFIRMANCE OF THE JUDGMENT BELOW (ATCHISON MOTION POINT III, PAGES 31-33)

Appellees erroneously state that the lower court "remanded the cause to the Commission with directions to consider 'the revenue needs of the carriers from *all* transportation services, including needs represented by passenger deficits' (B&O J.S. 20a)"; that, in so directing, the lower court concluded the Commission had erred; and that appellants in their jurisdictional statement failed to challenge the correctness of the alleged holding.

The cited reference to B&O J.S. 20a leads to a passage in the opinion of the lower court where, among other things, it expressed the view "that the findings [must] further show that, as required by Section 15(6), the Commission has considered the revenue needs of the carriers for *all* transportation services, including needs represented by passenger deficits." This was merely a general observation; for the lower court did not find, and could not have found, that the reports of the Commission were defective as appellees here charge. The findings of the Commission show that it did consider revenue needs from *all* transportation services, including passenger deficits, which are an inherent part thereof.[12] (B&O J.S. 74a-91a, 137a-142a)

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[12] This is because financial data relating to the amounts required by the carriers to pay operating expenses, taxes and a fair return on their carrier property necessarily encompass *all* transportation services and thus reflect the results of both freight and passenger operations. In the passages of its reports cited above, the Commission considered such data respecting freight and passenger services, both separately and in combination.

But even if the lower court's opinion were subject to the interpretation placed upon it by appellees, that would not be ground for affirmance, since subsidiary questions as to passenger deficits inhere in the Commission's consideration and findings as to revenues, expenses, taxes and return from *all* transportation services and are fairly comprised in Question 2 and Point II (pages 4, 16-20) of our jurisdictional statement.

V.

FAILURE OF THE LOWER COURT TO RETAIN JURISDICTION TO REQUIRE EQUITABLE RESETTLEMENTS (ATCHISON MOTION POINT IV, PAGES 33-34)

Appellees disregard the significant fact that the lower court found no error in the unchallenged findings of the Commission that the existing divisions were unjust, unreasonable and inequitable. They cite *Lehigh Valley Coop.* v. *United States,* 370 U.S. 76 (1962), as authority for the action of the lower court in remanding the cause to the Commission for further proceedings without retaining jurisdiction to require equitable resettlements of divisions in the event of a further order of the Commission on remand. That case did not overrule the well settled rule that a court of equity which finds defects in an administrative order has a duty to protect the interests of all parties involved pending the final determination of the controversy before the administrative tribunal. This doctrine was applied in *Atlantic Coast Line R. Co.* v. *Florida,* 295 U.S. 301, 311-316 (1935), *United States* v. *Morgan,* 307 U.S. 183, 190-198 (1939), and *United States* v. *Morgan,* 313 U.S. 409, 414-416, 421 (1941); and it was extended in *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U.S. 607, 619-623 (1944), to situations, like that existing here, where there is no actual judicial custody of a fund. *Lehigh* simply held it was not

necessary to protect the interests of the parties when the moneys in controversy had already been impounded. (370 U.S. at 99)

CONCLUSION

The questions presented by this appeal are important and substantial and the judgment of the lower court is erroneous. This Court should note probable jurisdiction.

Respectfully submitted,

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